

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

NICHOLAS KENNETH TRAMMELL,)	Case No.: 1:20-cv-01448-JLT (HC)
)	
Petitioner,)	ORDER DIRECTING CLERK OF COURT TO
)	ASSIGN DISTRICT JUDGE
v.)	
)	FINDINGS AND RECOMMENDATION TO
STATE OF CALIFORNIA,)	DISMISS UNEXHAUSTED PETITION
)	
Respondent.)	[THIRTY-DAY OBJECTION DEADLINE]
)	

On September 23, 2020, Petitioner filed the instant petition for writ of habeas corpus in United States Court of Appeals for the Ninth Circuit. (Doc. 1.) The Ninth Circuit transferred the petition to this Court on October 13, 2020. (Doc. 2.) Because the petition appears to be unexhausted, the Court will recommend it be SUMMARILY DISMISSED without prejudice.

DISCUSSION

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court. . .” Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990). The Advisory Committee Notes to Rule 8 indicate that the Court may dismiss a petition for writ of habeas corpus,

either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has been filed.

B. Exhaustion

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982).

A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v. Henry, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court was given a full and fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

Petitioner indicates that review in the Court of Appeals and California Supreme Court are pending.¹ (See Doc. 1 at 5-6.) Because it appears Petitioner's appeals are still pending, the petition is premature, and the Court must dismiss the petition. See Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001); Calderon v. United States Dist. Court, 107 F.3d 756, 760 (9th Cir. 1997) (en banc); Greenawalt v. Stewart, 105 F.3d 1268, 1273 (9th Cir. 1997). The Court cannot consider a petition that is entirely unexhausted. Rose, 455 U.S. at 521-22; Calderon, 107 F.3d at 760. Therefore, the petition must be dismissed for lack of exhaustion.

ORDER

The Court DIRECTS the Clerk of Court to assign a district judge to the case.

RECOMMENDATION

Accordingly, the Court RECOMMENDS that the habeas corpus petition be SUMMARILY

¹ It appears Petitioner has also sought relief in the California Supreme Court in various habeas corpus matters. The Court may take judicial notice of sources whose accuracy cannot be reasonably disputed (Fed.R.Evid. 201(b)(2)). Thus, the Court takes judicial notice of the on-line docket of the California Supreme Court.

1 DISMISSED without prejudice for lack of jurisdiction.

2 This Findings and Recommendation is submitted to the United States District Court Judge
3 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
4 Local Rules of Practice for the United States District Court, Eastern District of California. Within
5 thirty days after being served with a copy, Petitioner may file written objections with the Court. Such
6 a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.”
7 The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C).
8 Failure to file objections within the specified time may waive the right to appeal the District Court’s
9 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

10
11 IT IS SO ORDERED.

12 Dated: **October 15, 2020**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE